

# PROMINENT CRIMINAL CONVICTION PARTIALLY OVERTURNED ON FREE SPEECH GROUNDS

*Hodgson Russ Media & First Amendment Alert*  
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A New York appeals court has ruled that a state law prohibiting the false reporting of crimes could not be used to prosecute a woman based on her online social media posts, because it violated her First Amendment freedom of speech. The ruling in *People v. Burwell*, 2020 NY Slip Op 02205 (3d Dep't Apr. 9, 2020), was the result of a spring of 2016 incident involving three African-American students at the State University of New York at Albany, attracting national media attention and causing "Twitterverse" to explode.

## The Incident

In February 2016, Asha Burwell and two friends were riding an Albany City bus from downtown Albany to the SUNY Albany campus. While on the bus, a fight erupted between Burwell and her friends on the one hand and a number of other passengers, most of whom were Caucasian, on the other. The fight was partially recorded by a number of cameras on the bus and numerous passenger phones. After getting off the bus on campus, Burwell called 911 and reported that she and her "friends were just jumped on a bus for being black." "These girls . . . they were calling us the 'N' word and hitting us and so were guys[,] and the bus driver didn't do anything about it until we got to campus, and he stopped the bus and still . . . guys continued to hit us in the face." In the days that followed the incident, Burwell and her friends made similar statements on social media and during interviews with local and national media.

## The Indictment and Trial

The ensuing investigation did not support Burwell's version of events. Accordingly, Burwell was charged in an 11-count indictment with assault in the third degree, harassment in the second degree, and four counts of falsely reporting an incident in the third degree. Penal Law § 240.50 (1) governed the false reporting charges and states: "[a] person is guilty of falsely reporting an incident in the third degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she initiates or circulates a false report or warning of an alleged occurrence . . . of a crime . . . under circumstances in which it is not unlikely that public alarm or inconvenience will result."

## Attorneys

Ryan Cummings  
Patrick Hines  
Ryan Lucinski  
Elizabeth McPhail  
Aaron Saykin  
Gary Schober  
Christian Soller  
Daniel Spitzer

## Practices & Industries

Media & First Amendment

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After a jury trial, Burwell was convicted of two counts of falsely reporting an incident in the third degree and acquitted on all other counts. Burwell moved to dismiss the indictment and/or set aside the verdict alleging, among other things, that at least one of the false reporting counts infringed her First Amendment free speech rights. At sentencing, the trial court denied the motion in its entirety and sentenced her to concurrent terms of three years of probation on each count, assessed a fine, and ordered community service.

### The Appeal

On April 9, 2020, an Appellate Court rejected Burwell's argument that the verdict was against the weight of the evidence. However, her Constitutional argument gained more favor on one of the false reporting charges. Specifically, the Court found that Penal Law § 240.50(1), as applied in this context, was unconstitutional.

The Court determined that Penal Law § 240.50(1) "criminalizes a certain type of speech, namely false speech, the restrictions on speech are content-based, rather than time, place or manner limitations. To that end, content-based restrictions are presumed invalid, and . . . the Government bear[s] the burden of showing their constitutionality." A fundamental principle of the First Amendment is that "even false speech is considered protected and, in that context, content-based restrictions are subject to "the most exacting scrutiny." Such content-based restrictions are "enforceable only if it is the least restrictive means for serving a compelling government interest." "There must be a direct causal link between the restriction imposed and the injury to be prevented."

While the Court had no problem finding that the statute is designed to address a compelling governmental interest, *i.e.*, preventing public alarm and the waste of public resources that may result from police investigations predicated on false reports. But the Court was not persuaded that the statute was "the least restrictive means for serving those purposes, as applied to defendant . . ." As such, the statute, as applied, was "impermissibly broad."

Relying on the Supreme Court's decision in *United States v Alvarez*, the *Burwell* Court noted that "criminalizing false speech requires either proof of specific harm to identifiable victims or a great likelihood of harm." In Burwell's case, the Court held that a "general concern by those reading defendant's tweets does not rise to that level, nor does the proof adduced at trial, which established that defendant's tweets were "retweeted" a significant number of times." Noting that the "retweets" "led to nothing more than a charged online discussion about whether a racially motivated assault did in fact occur," the Court held that Penal Law § 240.50(1), as applied to Burwell's conduct, was unconstitutional.

In *dicta*, the Court commented that "[t]he remedy for speech that is false is speech that is true" and "social media platforms are information-disseminating fora. By the very nature of social media, falsehoods can quickly and effectively be countered by truth, making the criminalizing of false speech on social media not 'actually necessary' to prevent alarm and inconvenience." The Court, reviewing the voluminous online dialogue, noted that Burwell's "false tweets were largely debunked through counter speech; thus, criminalizing her speech by way of Penal Law § 240.50 (1) was not actually necessary to prevent public alarm and inconvenience."

### The Takeaway

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Under certain circumstances, it may be unconstitutional and a violation of the First Amendment to charge someone with falsely “reporting” a crime stemming from social media posts. Criminal attorneys who represent clients charged with making false reports to governmental authorities should evaluate whether the statute, as applied to their particular client’s alleged conduct, is constitutional. This is especially true where the false report allegedly stems from online comments. The question to ask is whether there is a direct link between the alleged criminal conduct and “unreasonable public alarm.” Based on *Burwell*, a general social media uproar with nothing more is unlikely to be sufficient “public alarm” to criminalize a defendant’s speech.

If you believe your organization is dealing with a similar situation and you would like to discuss the best way to respond or proceed, please contact Ryan Cummings (716.848.1665) or Aaron Saykin (716.848.1345), or any of our other Media & First Amendment Practice attorneys.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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